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Caterpillar Hit With Derivative Suit Over $2.4B Tax Evasion

By **Carmen Germaine**

Law360, Wilmington (February 26, 2016, 8:18 PM ET) -- A Caterpillar Inc. shareholder has hit the company with a derivative suit in Delaware Chancery Court, alleging Caterpillar brass exposed the company to billions of dollars in liabilities by signing off on a plan to avoid $2.4 billion in U.S. taxes by shifting profits to a Swiss affiliate.

Shareholder Judy Pill filed a derivative suit against Caterpillar's board of directors and the company auditor PricewaterhouseCoopers LLP, claiming they breached their fiduciary duties to the construction manufacturer by approving what a **Senate committee report in 2014** said was a plan to use a Swiss subsidiary to dodge $2.4 billion in taxes.

As a result of that plan, Pill said, Caterpillar has already been ordered to pay $1 billion in penalties and back taxes by the Internal Revenue Service, has settled a whistleblower suit for an undisclosed sum and is under investigation by the U.S. Department of Justice.

"The individual defendants, aided by PwC, knowingly cause Caterpillar to engage in an improper, illegal and possibly criminal course of conduct spanning more than a dozen years," Pill said.

A report issued by the U.S. Senate Permanent Subcommittee on Investigations in March 2014 found that Caterpillar and PwC had developed the tax evasion strategy in 1999, setting up a wholly controlled Swiss affiliate called Caterpillar SARL.

Over the course of more than a decade, the report found, Caterpillar redirected $8 billion in profits from the sales of Caterpillar-branded replacement parts manufactured by third parties under contract with the company to CSARL, evading $2.4 billion in U.S. taxes.

Pill first filed a complaint seeking access to Caterpillar's books and records **in June 2015**. Thursday's suit does include some allegations from the company records, but that information has been redacted.

In her derivative suit, Pill alleges that Caterpillar's board approved a tax evasion scheme in conjunction with PwC, ignoring warnings that the set-up could cost the company billions in lawsuits and other legal liabilities down the road.

Pill says the company's former Global Tax Strategy Manager Daniel Schlicksup had expressed concerns over the strategy as early as September 2005, but Caterpillar's board ignored Schlicksup's warnings, demoting him and transferring him out of the tax department.

Schlicksup then filed a whistleblower suit alleging Caterpillar and several of its executives, including CEO Douglas R. Oberhelman, former CFO David B. Burritt and Chief Tax Officer Robin Beran had violated U.S. laws and defrauded stockholders, later settling for an undisclosed sum.

The fraud also resulted in an IRS audit, concluded in January 2015, that imposed $1 billion in back taxes and penalties for the 2007-2009 tax years. Pill said that Caterpillar is appealing the decision, but has also acknowledged that it filed tax returns using the same calculations for years after 2009, meaning its liability could still grow.

Caterpillar has also acknowledged that its use of Caterpillar SARL is **being investigated** by an Illinois grand jury and the SEC, and it could be subject to criminal charges in the future.

Pill's suit also alleges that PwC had significant conflicts of interest because it had both designed the transactions — collecting a fee of $55 million — and reviewed the transaction in annual financial audits.

"PwC was more concerned with finding 'creative' ways to justify the improper transaction to U.S. tax authorities than it was with providing Caterpillar with an unbiased assessment of its potential tax liabilities," the complaint said.

According to the complaint, one PwC employee discussing the alleged scheme over email with a manager said they would need to "do some dancing" to defend the transaction to tax authorities, but the manager replied that they would both "be retired" before the IRS would conduct an audit.

Pill said making a demand on the board to address the allegations would be futile because 11 of the 12 current board members were serving on the board at some point during the scheme.

"As such, the overwhelming majority of the current board members have caused, or knowingly permitted, Caterpillar to illegally evade U.S. taxes," Pill said.

Representatives for Pill and Caterpillar did not immediately respond Friday to requests for comment.

Pill is represented by P. Bradford DeLeeuw of Rosenthal Monhait & Goddess PA and by Wolf Popper LLP.

Counsel information for Caterpillar was not immediately available.

The case is Judy Pill v. Douglas R. Oberhelman et al., case number 12027-CB, in the Court of Chancery of the State of Delaware.

--Editing by Kelly Duncan.